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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

JOSE SORIANO,
Petitioner,
against
THE UNITED STATES,
Respondent.
No. 49

PETITIONER'S BRIEF IN REPLY TO SUPPLEMENTAL BRIEF FOR THE UNITED STATES ON THE STATUTE OF LIMITATIONS

Argument

A.

THE QUESTION WHEN PETITIONER'S CLAIM ACCRUED IS PROPERLY BEFORE THE COURT.

The government's argument in Points I and II of its supplemental brief requires no written reply, unless it be to the suggestion that the petitioner, in raising the question when the claim accrued, has improperly presented a question not previously presented, not decided in *Compania Maritima* v. *United States,* No. 50165 (Nov. 7, 1956), and not authorized to be argued before this Court.

Petitioner believes that this question—the date on which the claim accrued—is inherent in every suit before the Court of Claims. The question can be decided by following prior decisions either expressly or by im-

plication. It is submitted that the exact question of accrual now being presented to this Court was considered and decided by implication in *Compania Maritima* and in this case by virtue of the Court's prior decisions in *Tan* v. *United States*, 122 Ct. Cls. 662 (1952) and other similar cases since *Dino* v. *United States*, 119 Ct. Cls. 307 (1951), in which one of the two grounds for dismissal was a holding that since the claims had not been presented to the Army, they had not accrued.

The facts speak for themselves. Petitioner can make no allegations as to the legal conclusions flowing therefrom—the time of accrual of the claim—that are any more binding upon himself than they are on the government or on this Court. The question is one of law, to be decided by this Court before applying the relevant period of limitations.

Of course, if the Court agrees with the government's view of this matter, counsel for petitioner will withdraw Point A of Part II of his brief. Petitioner had no intention of urging any matters on the Court not within the scope of its permission to brief and argue the statute of limitations question.

B.

THE RUNNING OF THE TIME LIMITED FOR ACTION IN A CONSENT STATUTE IS SUSPENDED BY WAR IN THE SAME MANNER THAT ALL OTHER STATUTES LIMITING EITHER THE REMEDY OR THE RIGHT ARE SUSPENDED.

In its supplemental brief on the question of the statute of limitations the government does not rely on *Compania Maritima* v. *United States, supra,* in which

the Court of Claims held that war suspends the running of the statute of limitations (28 U. S. C. § 2501) as to citizens of belligerents, but not as to allies resident in enemy-occupied territory.[1]

Instead, the government takes a much broader position. The basic argument on which it relies is that the limitation provisions contained in 28 U. S. C. § 2501 are a limitation upon the consent of the United States to be sued and, as such, cannot be expanded by common law principles or by implication. The government attempts to distinguish a substantial body of case law on two grounds: (1) the decisions of this Court supporting petitioner's position were decided before *Erie R.R. Co.* v. *Tompkins,* 304 U. S. 64 (1938), and are now inapplicable and (2) a statute permitting suit against the sovereign should not be construed to include any exception not specifically mentioned therein.

Regarding the point based on *Erie R.R. Co.* v. *Tompkins, supra,* all that need be said is that the government completely misconstrues the meaning of this decision.[2] This Court is not now considering state-created rights, but is interpreting an act of Congress. In so doing, it will, of course, use time-honored methods of construction—among which are federal common law and international law. It is basic to the issue now being discussed that petitioner is not seeking to extend 28

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[1] We contend, of course, that the Court of Claims should have adhered to its decision in *Marcos* v. *United States,* 122 Ct. Cls. 641 (1952), in which it held that when persons in the forum are prohibited from trading and communicating with a claimant, the statute is suspended.

[2] See Moore, *Commentary on the U. S. Judicial Code,* pp. 307-359, esp. p. 340 (1949).

U. S. C. § 2501, but is attempting to establish the correct construction of that provision according to precedent and reason. It is submitted that this is where the second ground of the government's argument is deficient. That argument characterizes the petitioner's position as an attempt to extend the statute and does not join issue on the statute's construction.

The federal cases cited in petitioner's previous brief are based on federal common law incorporating established principles of international law. These decisions apply with equal force to 28 U. S. C. § 2501. They hold that statutes of limitations are based on the presumption that the courts are open to plaintiffs, and therefore a statute of limitations is suspended during the time when a person in petitioner's position is prohibited by international or local law from bringing an action.

Every reason which applies in construing a statute of limitations also applies in construing a limiting clause in a statutory consent to suit by a sovereign.[3] Where Congress has granted a remedy in the Court of Claims, it is not logical to conclude that it intended by the limitations provisions to take away the remedy before a claimant could resort to it.

The position now taken by the government was rejected by the Supreme Court of Oregon sitting *en Banc* in *Peters* v. *McKay*, 195 Ore. 112, 238 P. 2d 225 (1951). That case involved a suit against the State of Oregon

[3] The discussion of 28 U. S. C. § 2501 in this brief refers to the six year limiting period of that provision. Petitioner's Brief, Part II—Statute of Limitations, contains our position that the 3 year saving period is a matter of grace which is concerned with personal disabilities not relevant to this action and which is only to be considered if the 6 year provision is unavailing.

under an escheat statute by a plaintiff who had been a resident of the Netherlands during its occupation by Germany in World War II. After a complete survey of the authorities relating to the effect of war on ordinary statutes of limitations and on statutes creating and limiting new rights, the court held that when the courts are closed to claimants by war, "consent" statutes are suspended in the same manner as other statutes. The court said:

> "* * * The construction of the limitation in the consent statute presents an issue more closely resembling that involved in the cases in which it is held that war tolls ordinary statutes of limitation. In both, the right exists. In one the remedy is limited by a legislative mandate; in the other, the period within which the state consents to be sued is so limited. No reason is perceived why the court should not adopt a uniform rule of construction for both statutes when the intervention of war is asserted as ground for suspension of the running of the limitation. It is true that there is no provision in the consent statute for the suspension thereof, but the same is true concerning the cases in which it is held that war suspends statutes which create rights unknown to the common law and which limit both right and remedy. When the state consents to be sued, and then by reason of its recognition of rules of international and common law, closes its courts to the litigant, thereby denying the privilege which it granted, some construction must be sought which will avoid absurdity. It is unbelievable that the same hand which gives should also be construed to take away. The law does not follow the precedent of the nursery rhyme, 'Hang your clothes on a hickory limb, but don't go near the water.'" (238 P. 2d at 236)

The reasoning of *Peters* v. *McKay* was applied by the Supreme Court of California in *In re Caravas' Estate,* 40 Cal. 2d 33, 250 P. 2d 593 (1952), in support of a holding that the California escheat statute was suspended in favor of a resident of Greece during the German occupation of Greece during World War II.[4] So too, in *Osbourne* v. *United States,* 164 F. 2d 767 (2d Cir. 1947), the court held that in an action against the United States, a consent statute was suspended in favor of an American citizen who was interned by the Japanese.

The Court of Claims, moreover, has consistently recognized that the present and prior versions of 28 U. S. C. § 2501 are suspended when war closes the court to a claimant.[5] In the *Compania Maritima* case, the Court of Claims continued to recognize this principle, but restricted it in a way which petitioner believes is improper and illogical. See footnote 1, *supra.*

That statutes of limitations are suspended when trade and communication are prohibited and the courts are closed to a plaintiff is a principle of public and international law. See, *e.g., Hanger* v. *Abbott,* 73 U. S. 532 (1867). Read in this light, the above-cited cases are merely applications of the rule that, unless it is unmistakably clear that a legislature intends a statute to contravene a principle of international law, courts will

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[4] In *Caravas'* the United States took the position urged by us in this brief.

[5] *E.g., Marcos* v. *United States,* 122 Ct. Cls. 641 (1952); *Green* v. *United States,* 17 Ct. Cls. 174 (1891); *Campbell* v. *United States,* 13 Ct. Cls. 108 (1877); *Sierra* v. *United States,* 9 Ct. Cls. 224 (1870).

construe the statute to avoid any conflict with international law.[6]

C.

THE KENDALL CASE IN NO WAY SUPPORTS THE GOVERNMENT'S POSITION

Kendall v. *United States*, 107 U. S. 123 (1882), is relied on by the government as controlling on the question here involved. Analysis of this case reveals that it is not applicable to the present situation.

Kendall was a rebel who had been engaged in the service of the Confederacy. His cause of action arose on or about the last day of December, 1865, and his petition was filed November 22, 1872. The government pleaded the six-year statute of limitations (Act of March 3, 1863, § 10, 12 Stat. 765, 767), the terms of which were identical to former Section 2501, namely 28 U. S. C. § 262.

Another section (now repealed) in the Court of Claims Act in effect at that time provided:

> "* * * *Provided, however,* That in order to authorize the said court to render a judgment in

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[6] See *MacLeod* v. *United States*, 229 U. S. 416, 434 (1913):

> "The statute should be construed in the light of the purpose of the Government to act within the limitation of the principles of international law, the observance of which is so essential to the peace and harmony of nations, and it should not be assumed that Congress proposed to violate the obligations of this country to other nations, which it was the manifest purpose of the President to scrupulously observe and which were founded upon the principles of international law."

See also, *Peters* v. *McKay*, 195 Ore. 112, 238 P. 2d 225, 231, 233 (1951); *The Over the Top*, 5 F. 2d 838, 842 (D. Conn. 1925); 1 Hyde, *International Law*, 16-17 (2d rev. ed., 1945); *International Law*, 30 Am. Jur. 179, § 7.

favor of any claimant, if a citizen of the United States, it shall be set forth in the petition that the claimant, and the original and every prior owner thereof where the claim has been assigned, has at all times borne true allegiance to the Government of the United States, and whether a citizen or not, that he has not in any way voluntarily aided, abetted, or given encourgement to rebellion against the said Government, which allegations may be traversed by the Government, and if on the trial such issue shall be decided against the claimant, his petition shall be dismissed." (Act of March 3, 1863, § 12, 12 Stat. 765, 767)

Kendall claimed that, since he had been a rebel, the above statute in effect closed the Court of Claims to him and suspended the statute of limitations until the President's Proclamation of general amnesty of December 25, 1868 (15 Stat. 711) reopened that Court to him. Since suit had been brought within six years of that date, Kendall claimed that it was timely.

This Court rejected Kendall's contention, stating (p. 125):

"* * * And that there might be no misapprehension as to the intention of Congress, the statute, after enumerating the cases to which the limitation of six years should not apply, declares that 'no other disability than those enumerated shall prevent any claim from being disbarred.' The court cannot superadd to those enumerated, a disability arising from the claimant's inability to truthfully take the required oath. It has no more authority to engraft that disability upon the statute than a disability arising from sickness, surprise, or inevitable accident, which might prevent a claimant from suing within the time prescribed."

To understand the reasons underlying the Court's decision it is necessary to realize two things: First, by Presidential Proclamation, the Civil War ended on April 2, 1866, 14 Stat. 811 (*Sierra* v. *United States, supra; Green* v. *United States, supra*)—*a date more than six years prior to the filing of Kendall's petition.* Second, even before that date by Presidential Proclamation of May 29, 1865, 13 Stat. 758, amnesty was available to Kendall upon the single condition that he take an oath of allegiance to the United States.[7] If he had taken such an oath, Kendall would have been entitled immediately to prosecute a claim to judgment in the Court of Claims. *Green* v. *United States, supra; cf. Paragoud* v. *United States,* 80 U. S. 156 (1871).

Therefore, the Court of Claims was open to Kendall for more than six years prior to the filing of his petition. Persons in the forum were free to communicate with him and he was free to file a petition in the Court of Claims. The facts in the Kendall case thus gave no opportunity for the application of the rule of *Hanger* v. *Abbot,* 73 U. S. 532 (1867). Neither the opinion of this Court nor the opinion of the Court of Claims refers to *Hanger* v. *Abbot,* and the only reference in the Record on Appeal is a highly incidental reference in Appellant's Brief on Appeal.[8]

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[7] Amnesty under the Presidential Proclamation of May 29, 1865 was not available to certain enumerated classes of persons, unless presidential permission to take the required oath was obtained. Such permission was to be granted liberally. 13 Stat. 759. Neither the Court's opinion nor the Record or Briefs indicate whether Kendall came within one of the excepted classes. In the lower court's opinion (14 Ct. Cls. 374 (1878)) it is stated, however, that Kendall's status was the same as that of the claimant in *Sierra* v. *United States,* 9 Ct. Cls. 224 (1870), who *did not* fall within any of the excepted classes.

[8] P.6.

It is true, of course, that unless Kendall took an oath of allegiance to the United States as required by the proclamation of May 29, 1865, he could not have prosecuted his claim to judgment until after the general amnesty of December 25, 1868, but this was a *personal disability*. As this Court correctly pointed out, since this disability was not specifically included in the saving clause, the Court could not add it to those enumerated. In the instant case we are dealing with an absolute prohibition against communication recognized by international and local law, not a personal choice, nor personal disability.

Thus, the Kendall case does not hold that the statute of limitations is not suspended where war closes the court to a claimant. What the case does hold is this. Where, in the jurisdictional act establishing the Court of Claims, there is a provision establishing a condition precedent to jurisdiction (i.e. loyalty), and where the plaintiff, although given the opportunity, does not comply with that condition precedent, he cannot claim either that (1) his cause of action does not accrue until the statutory condition precedent is repealed, or that (2) his failure to comply with the statutory condition precedent is a "disability" which suspends the running of the statute of limitations. In other words, where the Court of Claims Act contains a condition precedent to jurisdiction, a plaintiff cannot use that provision to suspend the statute of limitations.

The basic condition in all of the cases where the statute of limitations has been held to be suspended in wartime is that courts are closed to the plaintiff be-

cause the people in the forum are prohibited by international or local law to communicate with him in any way. We have carefully examined the case law of the United States and have been unable to find a single case holding that an ordinary, substantive or "consent" statute of limitations is not suspended during the period in which those conditions exist.[9]

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[9] The authorities cited by the government as being in conflict with this statement, are inapposite. For example, the government cites *Rogulj* v. *Alaska Gastineau Mining Co.*, 288 Fed. 549 (9th Cir. 1923); *Poccardi* v. *Ott*, 83 W. Va. 166, 98 S. E. 69 (1919); 132 A. L. R. 317 (1941), in support of the proposition that where a time limit goes to the substance of the right involved, there is conflict in the cases as to whether the above-mentioned conditions toll the statute. In the *Poccardi* case, it clearly appears that trade and communication between the plaintiff, a resident of Italy, and the defendant were not prohibited during World War I. In the *Rogulj* case, it does not appear whether trade and communication between the plaintiff and defendant were prohibited throughout the entire period during which plaintiff claimed the statute was suspended, and the court seems to speak in terms of difficulty of communication, and waiver and estoppel, rather than of absolute prohibition. The annotation in 132 A. L. R. 317 cites only the *Poccardi* and *Rogulj* cases in support of the Government's proposition.

In this respect, the only other case deserving comment which the government cites is *Haycraft* v. *United States*, 89 U. S. 81 (1874), which is distinguishable on the same grounds, *inter alia*, as stated above in relation to the *Kendall* case.

CONCLUSION

It is respectfully submitted that, for the reasons stated in this and in our main brief on the statute of limitations, the petition in the instant case was timely filed.

Respectfully submitted,

PREW SAVOY,
203 WORLD CENTER BUILDING,
WASHINGTON 6, D. C.,
Counsel for Petitioner.

CHARLES C. PARLIN,
20 EXCHANGE PLACE,
NEW YORK 5, N. Y.,

JAY PFOTENHAUER,
333 MONTGOMERY STREET,
SAN FRANCISCO 4, CALIFORNIA,
Of Counsel.

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